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No. 04-1693

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CONTESSA PREMIUM FOODS, INC.,

Petitioner,

v.

BERDEX SEAFOOD, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT HANWA AMERICAN CORPORATION

DAVID LIEBERWORTH
GARVEY SCHUBERT BARER
Attorneys for Respondent
Hanwa American Corporation
Eighteenth Floor
1191 Second Avenue
Seattle, WA 98101-2939
(206) 464-3939

196371

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

CORPORATE DISCLOSURE STATEMENT

Respondent Hanwa American Corporation ("Hanwa American") states that Hanwa Co., Ltd. owns 100% of the stock of Hanwa American.

STATEMENT OF FACTS

In its Statement, petitioner Contessa Premium Foods, Inc. ("Contessa") asserts that respondents "purchased millions of dollars worth of Lockpur shrimp in master cartons which they then sold to U.S. customers." Petition for Certiorari, at 3. In the context in which this statement occurs, the implication is that the frozen shrimp in question were contained in packaging using Contessa's Boiling Shrimp Image. As to respondent Hanwa American Corporation ("Hanwa American"), this is false. As the Ninth Circuit noted, there was "no admissible evidence in the record that . . . Hanwa American . . . ever possessed, let alone distributed, the allegedly infringing packaging. . . ." App. 6a. Moreover, Contessa does not challenge this factual conclusion and, for this reason, has chosen not to challenge the Ninth Circuit's judgment against Contessa on any of the trademark claims asserted as to Hanwa American in its certiorari petition. Petition for Certiorari, at 6 n.5

REASONS FOR DENYING THE PETITION

Respondent Hanwa American opposes petitioner Contessa's Petition for Writ of Certiorari. As a result of concessions and limitations by Contessa, Hanwa American has only limited involvement in the matters as to which Contessa seeks review by this Court. Accordingly, this opposition will be extremely brief.

First, footnote 5 of Contessa's petition states as follows:

> With respect to five other defendants [, including Hanwa American], the [Ninth Circuit] court held that petitioner's [Contessa's] trademark claims

> failed *because petitioner had not produced sufficient evidence to show that those defendants had ever used the Boiling Shrimp Image in commerce.* App. 6a – 7a. *Petitioner* does not seek review of this aspect of the court of appeals' decision and, accordingly, *does not challenge the judgment with respect to those five defendants on the trademark claims.*

(Emphasis added.) This footnote essentially eliminates Hanwa American from all of the issues save one as to which Contessa seeks review. It does so on the basis that – as the Ninth Circuit explicitly found (App. 6a.) – there was no evidence that Hanwa American had ever distributed packaging using the Boiling Shrimp Image in which Contessa claimed intellectual property rights.

Second, this admission also adversely impacts Contessa's position on the only issue before this Court as to which Hanwa American might have any interest. Contessa contends that the Ninth Circuit should be asked to re-evaluate its decision, that Hanwa American and other defendants were also not liable under the U.S. Copyright Act, in light of this Court's recent decision in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.* (No. 04-480, Slip Op., June 27, 2005) ("*Grokster*"). In *Grokster*, this Court held that "one who *distributes a device* with the object of promoting its use to infringe copyright, as shown by clear expression or other *affirmative steps taken to foster infringement*, is liable for the resulting acts of infringement by third parties." (Slip. Op. p. 1 (emphasis added).) There is nothing remotely like such a fact pattern here. Instead, as noted above, Hanwa American did not "distribute" anything of relevance here, whether in the form of the Boiling Shrimp Image or anything

else. Nor can Contessa point to any evidence that Hanwa American did anything to "foster" anyone else's infringement. The ruling in *Grokster* therefore has no bearing here, and a remand would therefore serve no purpose.

CONCLUSION

For the reasons set forth above, Contessa's petition for certiorari should not be granted as to Hanwa American.

Respectfully submitted,

DAVID LIEBERWORTH
GARVEY SCHUBERT BARER
Attorneys for Respondent
Hanwa American Corporation
Eighteenth Floor
1191 Second Avenue
Seattle, WA 98101-2939
(206) 464-3939